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# Supreme Court of the United States

OCTOBER TERM, 1946

No. 94.

UNITED STATES,

*Petitioner,*

against

N. Y. RAYON IMPORTING CO., INC. (=2), and ALFRED L. ROSE, WALTER MENDELSOHN and BERNARD D. LANG, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc. (=2),

*Respondents.*

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*Petitioners,*

against

UNITED STATES,

*Respondent.*

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

## BRIEF FOR RESPONDENTS-PETITIONERS.

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## BRIEF FOR RESPONDENTS-PETITIONERS.

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### Opinion Below.

The opinion of the Court of Claims (R. 21-29) is reported in 105 C. Cls. 606.

## Jurisdiction.

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). A petition for certiorari was filed on April 30, 1946 by the United States and a cross-petition for certiorari was filed on May 1, 1946 by N. Y. Rayon Importing Co., Inc. (#2) and its liquidating directors (hereinafter referred to as the plaintiffs). The petitions were granted on October 14, 1946. Jurisdiction to issue the writs is conferred by Section 3(b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288(b).

## Questions Presented.

1. The question presented on the writ of the United States as petitioner is whether the Court of Claims has the power to award interest where payment of a judgment of the United States Customs Court has been unjustifiably withheld by the Comptroller General.

2. The question presented on the cross-writ of the plaintiffs is the correct date from which interest should have been awarded.

The Court of Claims allowed interest from April 19, 1941, although the Customs Court judgments had been entered in 1937.

The Government asserts that the Court of Claims has no power to award interest on unpaid preexisting judgments against the United States, no matter how long payment may be unjustifiably withheld. The Government concedes only one exception—where the

withholding results from a claim of cross-indebtedness which is ultimately litigated and adjudicated to be invalid (Act of March 3, 1875, 31 U. S. C. 227).

We urge that interest should have been awarded at least from 1938 when the Comptroller General withheld payment of the Customs Court judgments, rather than from April 19, 1941 the date selected by the Court of Claims.

## Statement.

Plaintiff, N. Y. Rayon Importing Co. Inc. (#2) (hereinafter called Rayon #2) is the successor and sole stockholder of two other corporations, N. Y. Rayon Importing Co. Inc. (#1) and Nyrayco Importing & Converting Corporation (hereinafter respectively called "Rayon #1" and "Nyrayco"), which in 1937 recovered judgments in the United States Customs Court against the United States for excessive customs duties (R. 16).

The withholding of payment of these judgments by the Comptroller General ultimately required suits in the Court of Claims which, on February 4, 1946, resulted in judgment in favor of Rayon #2 and its liquidating directors for the amount of the Customs Court judgments, with interest from April 19, 1941 (R. 27).

The Government has acquiesced in the judgment, except as to the allowance of interest, and the writs of certiorari relate only to this question.

The facts are not in dispute and were found by the Court of Claims as follows:

**Status of Parties.**

Plaintiff's predecessors, Rayon #1 and Nyrayco, were engaged in the business of importing rayon yarn, and between 1925 and 1929 were forced to pay large sums of money for customs duties which had been unlawfully assessed. Between 1925 and 1929 these corporations duly filed protests against said assessments, thereby instituting actions in the United States Customs Court (R. 10).

On March 1, 1930 plaintiff, Rayon #2, was incorporated as part of a corporate reorganization by which it succeeded to all the assets and liabilities of Rayon #1, Nyrayco and two other corporations, all of which corporations were equitably owned by the same interests as continued to own Rayon #2 (R. 10, 14, 15). As part of the reorganization, Rayon #1 was voluntarily dissolved under the provisions of Section 105 of the New York Stock Corporation Law (R. 14, 15), which expressly provides that the corporate existence of a dissolved corporation continues for the purpose of winding up its affairs and maintaining suits.

Nyrayco also discontinued its business activities on March 1, 1930, and was eventually involuntarily dissolved on December 16, 1935 by proclamation, pursuant to Section 203-a of the New York Tax Law, for non-payment of franchise taxes (R. 16). At the time of its dissolution, Section 29 of the New York General Corporation Law likewise provided that a corporation upon dissolution "for any cause and whether voluntary or involuntary" continued in existence for the purpose of collecting its assets and winding up its affairs and might sue in its corporate name.

Prior to this dissolution all Nyrayco's assets had, by the 1930 reorganization, become the property of Rayon #2 (R. 10, 14, 15).

Plaintiff, Rayon #2 continued in business until January 9, 1931, when it was voluntarily dissolved under Section 105 of the New York Stock Corporation Law (R. 15).

**The Customs Court Judgments.**

On April 30, 1937 and May 6, 1937, two judgments were entered in the United States Customs Court, determining that there were owing from the United States on account of customs duties paid by Rayon #1 the sum of $362,482.17, and on customs duties paid by Nyrayco the sum of $30,809.75 (R. 16).

**Comptroller General Withholds Delivery of Treasury Checks Drawn to Pay Judgments.**

Checks were drawn on the Treasury of the United States between August 4, 1937 and February 3, 1938, aggregating $393,292.46 (R. 16), but their delivery was withheld by the Comptroller General on the ground that Rayon #1 and Nyrayco had been dissolved (R. 17). Payment was refused notwithstanding the fact that the New York statutes dealing with dissolved corporations expressly permitted such corporations to collect their assets through their liquidating directors (New York General Corporation Law, Section 29).

In 1938 a formal petition was filed with the General Accounting Office, requesting that the checks be delivered, but the Comptroller General refused to deliver the checks either to Rayon #2 or to Rayon #1 and Nyrayco (R. 17).

After futile negotiations, in an attempt to satisfy the Comptroller General, a declaratory judgment was obtained by consent in the New York Supreme Court

on January 24, 1942, which adjudicated that Rayon #2 was the owner of the Customs Court judgments and refunds. Although a copy of the judgment and a new demand were sent to the Comptroller General, payment continued to be withheld (R. 17).

In a final effort to satisfy the Comptroller General a letter was written on February 26, 1943 on behalf of Rayon #2, Rayon #1 and Nyrayco, requesting that payment be made to Rayon #2, but offering, if the Comptroller General preferred, to have Rayon #2 consent that payment be made to Rayon #1 and Nyrayco and their liquidating directors (R. 17-18). The Comptroller General continued to refuse to make any payment to anyone (R. 18).

**Actions in the Court of Claims.**

As a last resort actions were instituted in the Court of Claims on April 29, 1943 by Rayon #2, Rayon #1 and Nyrayco to compel payment of the Customs Court judgments. The actions were consolidated and tried together, the three corporations being united in interest and represented by the same attorneys (R. 20).

Despite the fact that payment had been withheld since 1938, at the trial the Government offered no evidence, and made no effort to controvert plaintiffs' evidence, which was basically documentary. No exception was taken to the findings of the Hearing Commissioner.

In the Court of Claims, the Government did not question the succession in 1930 by Rayon #2 to the assets of Rayon #1 and Nyrayco (including the rights to the customs refunds) (R. 14).

The Government conceded its obligation to pay the judgments for $362,482.17 based on the customs claims of Rayon #1 (R. 23), although payment of these had been withheld for eight years.

The Government, however, altogether denied the power of the Court of Claims to allow interest on these unpaid judgments, and also disputed the validity of the smaller judgment, amounting to $30,809.75, based on the customs claims of Nyrayco (R. 23-24).

As to the Nyrayco judgments, the Government did not deny that Nyrayco had been compelled to pay such excess duties (R. 22). The Government however took the position that the Customs Court judgments in favor of Nyrayco were void because entered after Nyrayco's *involuntary*[1] dissolution in 1935 under the N. Y. Tax Law § 203a for nonpayment of franchise taxes (a dissolution which had occurred five years after Nyrayco's transfer of all its assets to Rayon #2 [R. 14]).

The Court of Claims overruled this legally unjustified objection (R. 23-25) (the propriety of which ruling the Government does not question), entered judgment in favor of Rayon #2 for the entire amount of the Customs Court judgments in favor of both Rayon #1 and Nyrayco, aggregating $393,292.46, and allowed interest on the judgments from April 19, 1941 (R. 27).

April 19, 1941 was the date when, according to the Court of Claims, by an amendment to the New York

[1] No objection was made as to the judgments in favor of Rayon #1, since that corporation had been voluntarily dissolved and no New York tax question ever existed (R. 15).

Tax Law §203a, "all question of the capacity of plaintiffs to maintain suit was removed" (R. 26; N. Y. Laws 1941, c. 590).

The Court of Claims appears to have overlooked the fact that no question as to the capacity of Rayon #1 and Rayon #2 ever was or could have been raised. While the amendment to the N. Y. Tax Law might have had some bearing on the Nyrayco judgment of $30,809.75, it did not have any conceivable relation to the much larger judgments on Rayon #1's claims amounting to $362,482.17.

*By the time the judgment in the Court of Claims was entered on February 4, 1946, the Government had had the use of plaintiffs' $393,292.46 for more than seventeen years* since the collection of the customs duties, *and for more than eight years since the Customs Court judgments* (R. 10, 16).

## Specification of Errors to Be Urged.

1. The Court of Claims erred as to the time from which interest was to run by erroneously fixing April 19, 1941 instead of the dates on which the checks were drawn.

2. The Court of Claims erred in failing to fix as the starting dates for allowance of interest the dates on which checks were drawn, payment of which was withheld by the Comptroller General.

## Summary of Argument.

I. The Court of Claims was justified in allowing interest on the judgments of the Customs Court. Both the Act of March 3, 1875 as amended (31 U. S. C. 227)

and Section 177 of the Judicial Code (28 U. S. C. 284) by clear implication indicate a Congressional intention to allow interest after judgment.

II. Under the Act of March 3, 1875 (31 U. S. C. 227) interest should have been allowed at least from the time payment of the Customs Court judgments was withheld in 1938. April 19, 1941, the date of a New York Tax Law amendment, selected by the Court of Claims, had no conceivable relation to the $362,482.17 judgments of Rayon #1 (which was not dissolved under the Tax Law), and was irrelevant as to interest on the $30,809.75 judgments in favor of Nyrayco.

## Statutes Involved.

(1) The *Act of March 3, 1875*, as amended by the Act of March 3, 1933 c. 213, Title II §13, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

> "When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States,

or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

(2) *Section 177 of the Judicial Code*, 28 U. S. C. 284, which relates to interest on claims prior to judgment, reads as follows:

"(a) No interest shall be allowed on any claim *up to the time of the rendition of judgment** by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from

* All italics in this brief are ours, except as otherwise stated.

the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor."

## Argument.

### POINT I.

**The Court of Claims was justified in allowing interest on the judgments of the Customs Court.**

The Court of Claims realized that merely to have required payment of 1937 judgments in 1946, eight years after rendition, without awarding interest, would not have done full justice.

The Government cites cases holding that, in the absence of contract or statute, interest does not usually accrue on claims against the Government *prior to the entry of judgment*.

But the reason for the rule,—governmental immunity from suit—does not apply to interest accruing *after* judgment duly entered against the United States in a court to whose jurisdiction it has consented.

This Court has held that even in the absence of statute "just compensation" under the Constitution requires the payment of interest where property taken by the Government in condemnation is not paid for at the time of taking (*United States* v. *Richards*, 255 U. S. 163; *Seaboard Airline Ry. Co.* v. *United States*, 261 U. S. 299).

Here "the defendant had the benefit of the money, and the plaintiff was without it. Interest must be added if we are to make the plaintiff whole" (Cf. Cardozo, J., in *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1, 5-6).

The policy of allowing interest on unpaid *judgments*, where payment is withheld by the Comptroller General, is implicit in the statutes, particularly the Act of March 3, 1875 (31 U. S. C. 227), and has been repeatedly applied by the Court of Claims.

A.

**That interest runs after judgment is implicit in Section 177 of the Judicial Code; its restrictions relate only to original claims prior to judgment.**

The Government relies on that portion of Section 177 (a) of the Judicial Code (quoted in full, *supra*, pp. 10-11), which provides that, except in the case of Internal Revenue tax refund claims,

> "No interest shall be allowed on any claim *up to the time of the rendition of judgment* by the Court of Claims unless upon a contract expressly stipulating for the payment of interest, except * * *"

The prohibition of Section 177 (a) of the Judicial Code plainly refers only to interest on *original claims prior* to the rendition of judgment. This is clear not only from the words "up to the time of the rendition of judgment" but also from the exception expressed in the section, which specifically allows interest on Internal Revenue tax refund claims prior to any judgment from the date of payment of the excessive taxes.

The prohibition of interest "up to the time of the rendition of judgment", by necessary implication imports the accrual of interest after the rendition of judgment, and thus accords with our view of the law.

To construe Section 177 (a) of the Judicial Code as prohibiting interest upon preexisting judgments, would create unnecessary conflict with the Act of March 3, 1875 (amended in 1933, 31 U. S. C. 227), which expressly refers to interest on judgments.

Under the Act of March 3, 1875, the courts have repeatedly granted interest on preexisting judgments (pp. 22-24, 27, *infra*), and have recognized that the prohibition of Section 177 (a) of the Judicial Code applies only to *original* claims *prior to judgment*.

In *Stewart & Co.* v. *United States*, 71 C. Cls. 126 (1930) the Court of Claims in allowing interest *after* a judgment, held Section 177 (a) of the Judicial Code to be inapplicable, writing (p. 151):

> "The words 'no interest shall be allowed on any claims up to the date of rendition of judgment by the Court of Claims' we think were intended to apply to suits on the original claim."

## B.

**The Act of March 3, 1875 as amended (31 U. S. C. 227), enunciates the rule that interest is allowable on judgments payment of which is erroneously withheld by the Comptroller General.**

The Act of March 3, 1875 as amended, 31 U. S. C. 227 (quoted in full, *supra*, pp. 9-10), provides that where a judgment is rendered against the United States and the Comptroller General believes that a cross-indebtedness is owing to the United States, he shall withhold payment of the judgment and litigate the cross-indebtedness, but that interest must nevertheless be paid by the United States from the date of the withholding to the extent that it is ultimately adjudged that no such cross-indebtedness existed.

Thus, under the express language of the statute, interest runs against the United States on unpaid judgments, even though the erroneous withholding of payment is effected by the Comptroller General, not only in good faith, but in accordance with a statutory duty (*American Steam Conveyor Corp.* v. *United States*, 10 F. Supp. at 577).

1. *The policy of the Act of March 3, 1875 is to allow interest where payment of a judgment is unjustifiably withheld.*

As well stated in *American Potash Co.* v. *United States*, 80 C. Cls. 160, 166 (1934), by Littleton, *J.*, as to the Act of March 3, 1875:

"The whole purpose of the Act was to com-

> pensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him * * *"

The plain spirit and purpose of the Act of March 3, 1875, was stated in *United States* v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887, 890 (C. C. A. 6th, 1929), by Moorman, *C. J.*:

> "This allowance of interest which the statute makes was obviously intended as compensation to the claimant for the unauthorized withholding of the payment of his claim."

Yet the Government here contends that, though under the statute interest accrues on judgments if the withholding results from an erroneous belief in the existence of a cross-indebtedness, interest does not accrue *when payment of the judgment is withheld for any other reason—or for no reason at all.*

No policy is advanced for a differentiation which would make the right to interest on a judgment depend upon the reason the Comptroller General elects to assign for withholding payment.

We submit that "that is not the way to read the will of Congress, particularly when expressed by a statute * * *" "a hospitable scope must be given to Congressional purpose" (*United States* v. *Hutcheson*, 312 U. S. at 235).

> "The policy as well as the letter of the law is a guide to decision." (Douglas, *J.*, in *Markham* v. *Cabell*, 326 U. S. at 409.)

2. *Broad application is given to a policy indicated by Congress even when such policy is expressed in a statute which refers in terms only to a specific situation.*

Mr. Justice Holmes on circuit in *Johnson* v. *United States*, 163 Fed. 30, 32, enunciated the principle in language which has been repeatedly quoted by this Court:

> "We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. *A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.* The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

The Congressional major premise implicit in the Act of March 3, 1873 (as well as in Section 177 (a) of the Judicial Code) is that interest runs after the entry

of judgment. This major premise should be given effect even though not expressed in meticulous language.

The same principle of statutory construction has been applied by this Court in a number of situations, including Governmental immunity from suit, to which the question of immunity from interest is closely analogous.

In *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, this Court held that even though a statute did not in terms waive the immunity from suit of a wholly-owned Government corporation, Congress had indicated a general policy to this effect by waiving such immunity in statutes applicable to other governmental corporations. The Court wrote (pp. 389 and 394):

> "Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the right and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit" (p. 389) * * *
>
> "To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different

from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. "A fair judgment of the statute in its entire setting relieves us from making such an *imputation of caprice*" (p. 394).

So here, to hold that interest runs on judgments only when payment is withheld because of a claim of cross-indebtedness, and not when erroneously withheld for other reasons, is to impute to Congress a desire for incoherence and for drastic legal differentiation where policy justifies none.

In *United States* v. *Hutcheson*, 312 U. S. 219, this Court held that the Norris-LaGuardia Act, restricting injunctions in labor dispute cases in the federal courts, established a policy changing the previously settled rule that the Sherman Law applied to labor unions. Mr. Justice Frankfurter wrote (p. 235):

> "Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out *the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit * * * [quoting from *Johnson* v. *United States*, 163 F. 30, 32]."

In *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, although no statute expressly terminated the common law rule abating tort actions on the death of the plaintiff, this Court held that the policy of the Merchant Marine Act of 1920 indicated such a policy in relation to actions brought by the beneficiary in a death action. Cardozo, *J.*, wrote (pp. 350-1):

> "There are times when uncertain words are to be wrought into consistency and unity with *a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system.* 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.'"

To avoid injustice or to give effect to the implicit legislative purpose, this Court has not hesitated to restrict or broaden the application of statutes.

In *Sorrells* v. *United States*, 287 U. S. 435, this Court read an exception into the plain language of the statute to cover the case of entrapment by Government officials. Hughes, *C. J.*, wrote (pp. 446, 448):

> "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice have frequently been condemned. (citing cases) * * *
>
> "We are not forced by the letter to do violence to the spirit and purpose of the statute."

In *United States* v. *American Trucking Associations*, 310 U. S. 534 (1940), Mr. Justice Reed stated (pp. 543-4) as to construction of statutes:

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an

unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

This principle was enunciated by this Court as early as 1845 when in *United States* v. *Freeman*, 44 U. S. 557, it was held that the Act of 1818 covering brevet "officers of the army" should be deemed to include such officers in the marine corps, because there was a general policy of uniform treatment. Mr. Justice Wayne wrote (p. 565):

> "These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason."

Accord: *Silver* v. *Ladd*, 74 U. S. 219 ("single man" held to include "widow").

The Act of March 3, 1875 clearly proceeds on the policy that interest shall be allowed on unpaid judgments where payment is erroneously withheld.

Surely, if, as the Government admits, interest accrues on judgments where payment is withheld by the Comptroller General in the justifiable but erroneous belief that there is a set-off, it would be anomalous to hold that interest does not run where the withholding is without even such justification.

In *United States* v. *Farenholt*, 206 U. S. 226, aff'g. 41 C. Cls. 517, this Court wrote as to a contention by the Government which would have had a similarly anomalous result (p. 229):

> "* * * In other words, the government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And 'construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter, of the text.'"

## C.

**Interest has been repeatedly granted in conformity with the policy underlying the Act of March 3, 1875, even when not within its letter.**

The Government has urged that the Act of March 3, 1875 only applies where four supposed "conditions" coincide, writing in its brief below:

> "The Act of March 3, 1875, as amended by the Act of March 3, 1933, by its terms prescribes the following conditions which must be met before interest is recoverable under it: (1) the claimant must have a final judgment against defendant and present it to the Comptroller General for payment; (2) the Comptroller General must withhold payment of the judgment by way of set-off of some claimed indebtedness of the claimant to

> defendant; (3) the claimed indebtedness of the claimant to defendant must be reduced to suit; (4) in such suit judgment must be rendered against defendant either in the whole or part of the amount withheld by the Comptroller; i. e., the set-off must be adjudicated invalid in whole or in part."

The provisions as to cross-indebtedness in the Act of March 3, 1875 are neither phrased nor intended as *conditions* to the allowance of interest on judgments; they simply prescribe the procedure to be followed by the Comptroller General in order to justify his withholding immediate payment of such judgments.

The courts have accordingly allowed interest where all the last two or three supposed "conditions" were absent.

*American Potash Co.* v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717 (1934), is squarely in point. In that case it had been determined that the plaintiff was entitled to a tax refund of $105,432.89 and a check in this amount, dated May 17, 1930, was mailed to the plaintiff. The Comptroller General withheld payment in order to investigate the possibility of indebtedness to the United States on account of taxes for other years and, without making a definite claim or instituting any suit, continued to withhold payment until June 12, 1931 when he concluded that no cross-indebtedness existed and allowed payment. Plaintiff thereupon sued in the Court of Claims for interest from the date of the check to the date of payment, and was awarded judgment under the provisions of the Act of March 3, 1875.

The chief argument urged by the Government in the *American Potash* case in opposition to the claim for interest was that since there had been no definite claim of cross-indebtedness, no suit and no adjudication of that point, the delay being due simply to a reasonable investigation by the Comptroller General, the case did not fall within the literal language of the Act of March 3, 1875. This argument was repudiated by the Court, Littleton, *J.*; writing (80 C. Cls. 160, 165-166, 8 F. Supp. 717, 719):

> "In our opinion the plain provisions and obvious purpose of the Act of 1875 negative this contention. * * * *The whole purpose of the Act was to compensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him,* if it should be ultimately determined that he was not otherwise indebted to the United States. * * * *In our opinion, this is even a stronger case for the allowance of interest than one where a definite indebtedness is claimed by the Government to exist in its favor and is prosecuted to final judgment.*"

The decision in the *American Potash* case was never appealed by the Government and the policy enunciated therein was apparently acquiesced in by the Government.

In *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, cert. denied 296 U. S. 599, it had been determined that the plaintiff was entitled to a tax refund of $13,544.49. The Comptroller General ordered the entire sum withheld because of an alleged offset of $112.58, which plaintiff disputed. The difference of $13,431.91 was eventually

paid, without suit or adjudication, by the Comptroller General. The plaintiff then instituted action to recover interest on the $13,431.91 for the period withheld. Judgment was rendered for the plaintiff under the Act of March 3, 1875, notwithstanding the fact that all the supposed conditions of the statute were not present, Green, *J.*, writing (81 C. Cls. at 164):

> "We find nothing in this case which takes it out from under the provisions of this statute allowing interest on the overpayment from the time it was allowed until paid. *It is urged in argument on behalf of the defendant that the Comptroller General acted within a reasonable time. For the purposes of the argument this may be conceded* although the government's claim was a specific and liquidated one. *But the plaintiff was deprived of the use of a sum of money, which at all times after the allowance of the claim, was admitted to be due and owing to it. It is only fair and just that it should receive compensation* therefor and if the act be construed not to provide for compensation under such circumstances it becomes of little benefit to the parties which the act was intended to relieve."

In *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (D. C. Ga.) the General Accounting Office refused to pay a tax refund that was concededly due to the La Grange Grocery Co. because of an alleged offset and caused an action to be instituted to recover the amount alleged to be due the United States. The defendant counter-claimed for the amount due on the tax refund. Pending the action the Government

abandoned its claim and sent a check for the refund due. The Court awarded judgment to the defendant for the interest upon the amount improperly withheld under 31 U. S. C. 227 notwithstanding the fact that no judgment had been entered adjudicating the invalidity of the offset.

## D.

**Judgments of the Customs Court are judgments within the meaning of the Act of March 3, 1875.**

There is no reason why in applying the provisions of the Act of March 3, 1875, a judgment of a Customs Court should be treated any differently from a judgment of any other court of the United States.

In *David L. Moss Co. Inc.* v. *United States*, 103 F. (2d) 395, 397, the Court referred to the functions of the Customs Court and wrote:

> "The court is a court of law, and it is granted full power to relieve against illegality in the assessments or collection of duties 19 U. S. C. A. §§ 1515, 1518. * * * its jurisdiction in such matters is exclusive."

In *Brooks* v. *Mandel-Witte Co. Inc.*, 54 F. (2d) 992, 994, the Court wrote:

> "A final order or decree of the Customs Court, sustaining or overruling a protest, is in the form of a declaratory judgment and a direction to the Collector, as the tariff acts require, to reliquidate the entry accordingly."

In its petition for certiorari the Government suggested that the Act of March 3, 1875 applies only to "money judgments" and not to the declaratory judg-

ments of the Customs Court. No such distinction is made in the statute.

Moreover, the judgments of the Customs Court were in effect money judgments. The provision contained in a judgment of the Customs Court for reliquidation of the customs entries is a direction that a mere ministerial function (to wit, mathematical computation of the amount due) be performed by the Collector of Customs, similar to the computation of costs made by the Clerk of the Court in an action at law.

The Customs Court entered its judgments in 1937 and the duty of the Government to pay such judgments cannot be questioned. As payment was withheld for eight years after the judgments, and as the Government had the use of plaintiffs' money for seventeen years, the Court of Claims was empowered, and to do justice was obliged, to award interest.

## POINT II.

**Interest should have been allowed from the time when payment of the Customs Court judgments was withheld, not later than 1938.**

The exact amount due was determined when the customs duties were reliquidated pursuant to the judgments of the Customs Court dated April 30, 1937 and May 6, 1937. Refund checks were drawn on dates from August 4, 1937 to February 3, 1938 (R. 16, 7-8).

In 1938 the Comptroller General refused to permit delivery of the checks (R. 16, 17), and after years of fruitless negotiations with the General Accounting Office, plaintiffs were forced to institute these actions to secure a second judgment in the Court of Claims.

A.

**Interest runs from the date payment of a judgment is withheld.**

The provisions of the Act of March 3, 1875, 31 U. S. C. 227, are clear that where interest on a judgment is to be awarded against the United States, it shall be "from the time it [payment of the prior judgment] has been withheld from the plaintiff."

*American Potash Co.* v. *U. S.*, 80 C. Cls. 160 (1934), held that under the above section, interest should run from the date of the issuance of the checks, payment of which was later stopped by the Comptroller General.

Numerous other cases under the Act of March 3, 1875, *e. g.*, *United States* v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th); *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.); *Colorado Condensed Milk Co.* v. *United States*, 70 C. Cls. 671; *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, cert. denied 296 U. S. 599; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, cert. denied 290 U. S. 671, have held that where the Act applies, interest runs from the time payment of the amount due by the United States has been withheld from the plaintiff.

We have found no authority to the contrary.

Under the *American Potash Co.* case, interest should run here from the dates of the various checks drawn in 1937 and 1938 in payment of the judgments, the delivery of which was withheld (R. 16, 7-8).

**B.**

**The date of April 19, 1941 had no relevancy to the question of interest on the judgments of Rayon #1 for $362,482.71.**

April 19, 1941, the date selected by the Court of Claims as the date from which interest was to run, was the date when the Governor of New York approved an amendment to Section 203a of the New York Tax Law (N. Y. Laws, 1941, c. 590), removing all possible question whether corporations previously *involuntarily* dissolved under the New York Tax Law for non-payment of franchise taxes had the right to maintain suits (R. 26).

The Court of Claims in its discussion of interest apparently failed to discriminate between the much larger judgments of Rayon #1 (whose validity even the Government never impugned) and the relatively small Nyrayco judgment of $30,809.75.

The Tax Law amendment was totally irrelevant to the Customs Court judgments for $362,482.71 in favor of Rayon #1, for no question as to capacity to sue was ever raised or has ever existed in relation to Rayon #1 and its successor, Rayon #2. These corporations were *not dissolved under the Tax Law* but were voluntarily dissolved in accordance with Section 105 of the New York Stock Corporation Law (R. 15).

The right of *voluntarily* dissolved New York corporations to maintain suit to collect their assets has never been disputed (New York Stock Corporation Law, Sec. 105, Sub. 8).

In fact, the Government never questioned the

validity of the Customs Court judgments entered on the customs claims of Rayon #1, and in its brief in the Court of Claims the Government not only conceded that payment must be made of the sum of $362,482.71, but also that there was no objection to having judgment run in favor of Rayon #2, the successor in interest of Rayon #1.

There is reference in the Court of Claims opinion to "the maze of reorganizations and transfers" (R. 25). But this statement is unsupported by the record or the findings, and not relevant to the question of interest. There was but one reorganization, as part of which there was one transfer of all assets by Rayon #1 and by Nyrayco, to Rayon #2, the successor corporation (R. 10, 14).

Moreover even where a complicated reorganization situation has existed interest has been allowed (*Aluminum Company of America* v. *United States*, 87 C. Cls. 96, 97).

Certainly, the April 19, 1941 amendment to the Tax Law had not the remotest relation to the Government's obligation to pay the Customs Court judgments in favor of Rayon #1 amounting to $362,482.71, and interest should have been allowed, at least on this amount, from 1938 when the General Accounting Office withheld payment.

C.

**The date of April 19, 1941 had no proper relation to the question of interest on the judgments of Nyrayco for $30,809.75.**

Even as to the $30,809.75 involved in the Nyrayco Customs Court judgments there was no legal basis for delaying the running of interest to April 19, 1941.

The Court of Claims has held valid the Customs Court judgments of 1937 (R. 23-25), and the Government has now acquiesced in this decision by paying the principal amount.

Assuming that up to April 19, 1941 the Comptroller General might mistakenly have had some doubt as to the validity of the Nyrayco judgment, that afforded no basis for disallowing interest. Under the Act of March 3, 1875, even where the Comptroller General withholds payment because he reasonably believes there is a cross-indebtedness, if he turns out to be in error, interest must be paid from the date of withholding. A misconception may explain the withholding but it does not suspend the accrual of interest.

As the Government has now recognized the validity of the Nyrayco judgment, discussion is not needed to show its validity. We merely summarize the legal situation to indicate how unjustified was the Comptroller General's conduct.

(1)

**The Nyrayco judgments were not subject to attack in view of the Government's failure prior to their entry to raise any objection based on Nyrayco's dissolution.**

Nyrayco had instituted suit in the United States Customs Court on its claims years prior to its dissolution. It had assigned all its assets, including these claims, to Rayon #2, in 1930, as part of the corporate reorganization, long prior to its dissolution (R. 10, 14).

Nyrayco's dissolution in 1935 was a matter of public record. Yet the Government never raised the question until years after the Customs Court judgments in favor of Nyrayco had been entered and after checks in payment for such judgments had been drawn in Nyrayco's name.

It is well settled that a defense that a plaintiff is not a corporation must be raised by affirmative plea prior to judgment, and that a judgment cannot be collaterally attacked on this ground.

> "Having failed to do so [to raise the defense in the trial court that the plaintiff was a dissolved corporation], the judgment rendered against him in the name of the defendant in error [the corporation] was a valid and binding judgment. * * *. The judgment in favor of the defendant in error was *res judicata* of all the defenses which were or could have been interposed by the plaintiff in error [the defendant] including the capacity of the defendant in error to maintain its suit. (Citing cases.)" (*Commercial Loan and Trust Co.* v. *Mallers*, 242 Ill. 50 at 53.)

*Accord:*

*United States* v. *Insurance Cos.*, 22 Wall. (89 U. S.) 99, 101;
*Commission* v. *Havemeyer*, 296 U. S. 506, 519;
*Morse Arms Mfg. Co.* v. *United States*, 16 C. Cls. 296;
*Basch* v. *United States*, 52 C. Cls. 134, 142;
*Philippine Sugar Estates Development Co.* v. *United States*, 39 C. Cls. 225, 237;
*Hebrew Congregation, etc.* v. *United States*, 6 C. Cls. 241, 245;
*Concordia Savings and Aid Ass'n.* v. *Read*, 93 N. Y. 474.
See also: *Pyrogravure Co.* v. *Staber*, 30 Misc. (N. Y.) 658;
*New York Rules of Civil Practice*, Rule 93, Subdivision 2.

Plainly, therefore, the Government's belated attack on the judgments in the name of Nyrayco was technically without merit.

(2)

**Under New York law, Nyrayco at all times had capacity to sue.**

The fact that in 1937, when the judgments were finally entered in the Customs Court, Nyrayco had been dissolved by proclamation under the New York Tax Law for non-payment of franchise taxes, did not in any way affect the validity of the Customs Court judgments, which actually belonged to Rayon #2.

The amendment to the Tax Law of April 18, 1941 merely clarified what had previously been law.

In 1937, when the Customs Court judgments were entered, Sec. 203-a of the Tax Law, providing for the involuntary dissolution of corporations failing to pay franchise taxes, did not state whether or not suits could be maintained by such dissolved corporations.

However, Sec. 29 of the New York General Corporation Law, which was in effect at the time of the dissolution of Nyrayco, and at all times since, read as follows:

> "Upon the dissolution of a corporation *for any cause and whether voluntary or involuntary* its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets, and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name. * * *"

The authorities (including the U. S. Customs Court) both prior to 1937 and thereafter held that suit to collect its assets might be maintained by a corporation dissolved under the Tax Law.

The Supreme Court of New York in *Vestal Products Co., Inc.* v. *Manufacturers Trust Co.*, 60 N. Y. Supp. (2d) 183 (1935), wrote:

> "This action is brought by a corporation dissolved on December 16, 1929, pursuant to Section 203-a of the Tax Law for non-payment of franchise taxes. The defendant moves to dismiss the complaint on the ground that the plaintiff has no capacity to sue and also asks alternative relief. * * *

"In 1932, Section 29 of the General Corporation Law was amended to provide that 'upon the dissolution of a corporation for any cause, and whether voluntary or involuntary, its corporate existence shall continue for the purpose of * * * collecting and distributing its assets * * * and it may sue and be sued in its corporate name'. The defendant argues that this section has no application in view of the fact that section 6 of the General Corporation Law provides that if there be in any other corporate law a provision conflicting with any provision of the General Corporation Law or of the Stock Corporation Law, the provisions of such other corporate law shall prevail. The court is of the opinion that section 6 does not apply here, there being no conflict between the provisions of section 203-a of the Tax Law and Section 29 of the General Corporation Law, *either in its 1929 or 1932 form* [italics the court's].

"The motion to dismiss for lack of capacity to sue is accordingly denied. * * *"

*Accord:*

*Klytia Corp.* v. *United States*, 72 T. D. 1124 (U. S. Customs Court 1937);

*Douglas* v. *Perlstein*, 170 Misc. (N. Y.) 561 (1939);

*London Lightinwares Corp.* v. *Norge Realty Corp.*, N. Y. Law Journal, April 23, 1938, p. 1968, Col. 6 (Sup. Ct.);

*Marford Direct Mailing Co. Inc.* v. *Socony Vacuum Oil Co., Inc.*, N. Y. Law Journal, December 8, 1938, p. 2027, Col. 2 (Sup. Ct.).

In 1939, some years after the entry of the judgments of the Customs Court, one of the four intermediate appellate courts of New York suggested, in *Matter of*

*Eisenstadt, Inc.* v. *Heffernan*, 256 App. Div. 488, that Section 29 of the General Corporation Law did not apply to corporations dissolved for non-payment of franchise taxes under Section 203-a of the Tax Law. That court, while not holding that such corporations were wholly dead, felt that the Tax Law was intended to penalize them. That case was affirmed, without opinion, by the Court of Appeals, 283 N. Y. 578, but as the respondent had urged a number of independent grounds for affirmance, and there was no opinion in the Court of Appeals, it is impossible to know on what ground the affirmance was ordered.

To remove the doubts raised by the *Eisenstadt* case, in *1940* the next session of the *New York Legislature*, on the written recommendation of the Deputy Secretary of State of New York in charge of the division of corporations (R. 25), promptly passed a clarifying law, expressly providing that Section 29 of the General Corporation Law applied to corporations dissolved under the Tax Law, *thus approving the interpretation given by the earlier New York cases* (N. Y. Laws, 1940, c. 82).

To avoid any question that this applied to corporations previously dissolved, the Legislature on April 19, 1941, adopted a further amendment to the Tax Law, making it clear that Section 29 of the General Corporation Law applied to any corporation "heretofore or hereafter dissolved under this section" (N. Y. Laws, 1941, c. 590).

The Court of Claims accordingly held (R. 24, 25) that at the time of the entry of the judgment in favor of Nyrayco, the New York law permitted such a corporation to sue and that this has continued to be the New York law.

That being so, interest should have been allowed from the time when payment of the judgments was withheld.

In any event, whatever doubts the Comptroller General might have had prior to April 19, 1941 with respect to the Nyrayco judgment, there was no basis for refusing to pay the Customs Court judgments of Rayon #1, whose validity the Government never even questioned.

## CONCLUSION.

**It is respectfully submitted that interest should be allowed from the dates of the refund checks of 1937 and 1938, under the provisions of the Act of March 3, 1875, 31 U. S. C. 227, and that the determination of the Court of Claims should be modified accordingly.**

Respectfully submitted,

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